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No. 09-815

IN THE

Supreme Court of the United States

FREQUENT FLYER DEPOT, INC.,
GEORGE PIRKLE, AND ROBERT PIRKLE,
Petitioners,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas, Second District

BRIEF IN OPPOSITION OF RESPONDENT AMERICAN AIRLINES, INC.

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QUESTION PRESENTED

Whether 49 U.S.C. §41713(b)(1) preempts American Airlines's tort claims seeking to protect American's contractual rights and that do not "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier."

CORPORATE DISCLOSURE STATEMENT

Respondent American Airlines, Inc. is a wholly owned subsidiary of AMR Corporation, which is a publicly traded company.

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IN THE

Supreme Court of the United States

No. 08-915

FREQUENT FLYER DEPOT, INC.,
GEORGE PIRKLE, AND ROBERT PIRKLE,
Petitioners,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas, Second District

BRIEF IN OPPOSITION OF RESPONDENT AMERICAN AIRLINES, INC.

INTRODUCTION

The Court should deny review of the interlocutory judgment of the Texas intermediate court of appeals because the Court lacks jurisdiction to review the lower court's judgment, this case does not present any important issue of federal law on which the lower courts disagree, and this case is a poor vehicle for addressing the questions presented.

American sued petitioners and a number of other parties to stop them from selling frequent-flyer

tickets illegitimately obtained through the wrongful purchase of frequent-flyer miles in disregard and open breach of American's AAdvantage frequent-flyer program contract. Petitioners act as a broker between people with American frequent-flyer miles and people who do not want to purchase tickets legitimately from American or a travel agent. Even though petitioners admit that their business is based on encouraging members of American's frequent-flyer program to breach their contracts with American, they instruct American's contractual counterparties to lie to American. When petitioners refused to stop their ongoing misconduct during the pendency of this case, American obtained a temporary injunction from the state district court enjoining petitioners from continuing to facilitate the improper sale and purchase of American's frequent-flyer award tickets.

The case now presented to the Court arises from the state court of appeals's judgment from an interlocutory appeal of a temporary injunction. No federal or state law issue has been finally determined by the Texas state courts. The court of appeals's determination that 49 U.S.C. §41713(b) does not preempt some of American's tort claims against petitioners does not fully resolve any preemption issue in this case, and the upcoming trial on the merits may make resolution of the preemption issues unnecessary. In any event, there is no relevant conflict among the lower courts regarding §41713(b) that would affect the issues in this case.

OPINION BELOW

The opinion of the Texas intermediate court of appeals, Pet. App. 3a-27a, is reported at 281 S.W.3d 215. The district court's order granting

the temporary injunction is unreported. Pet. App. 28a-30a.

JURISDICTION

This court does not have jurisdiction over this case under 28 U.S.C. §1257(a) because the court of appeals's judgment affirming the district court's temporary injunction is interlocutory and is not a final judgment.

STATEMENT OF THE CASE

In 1981, American established the AAdvantage frequent flyer program to develop passenger loyalty and increase revenues by rewarding customers who regularly fly American. Since then, American has invested substantial time and money in developing and running the program. 1 Supp. CR 82.[1] Members accumulate AAdvantage miles by flying on American and using services of designated AAdvantage partners. Members can exchange the miles for free award tickets and flight upgrades on American and

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[1] The record for this interlocutory appeal consists of a clerk's record, which includes the papers filed with the district clerk, and a reporter's record, which includes the transcript of the temporary injunction hearing and the exhibits admitted into evidence at the hearing. The clerk's record includes a First Supplemental and a Second Supplemental Clerk's record. Cites to the clerk's record are in the form [volume] CR [page], [volume] 1st Supp. CR [page], and [volume] 2nd Supp. CR [page]. Because this petition arises from an interlocutory appeal and the underlying case has continued to proceed in the trial court while the appeal has been pending, additional pleadings and other papers have been filed during the pendency of the appeal. In order for the Court to fully understand the current procedural posture of the case, it is necessary to refer to documents that have been filed in the trial court after the interlocutory appellate record was filed in this case.

its airline partners. American incurs the cost to transport passengers traveling on the award tickets. 1 Supp. CR 83. American issues its AAdvantage members award tickets for free flights so that it can increase customer loyalty and engender goodwill among its customers. 1 RR 93, 102, 105.

AAdvantage members agree to and are bound by the program's express terms and conditions. Among other commitments, they agree that "[a]ccrued mileage credit and award tickets do not constitute [their] property," and they consent to the "No Sale Rule," which provides that "[a]t no time may AAdvantage mileage credit or award tickets be purchased, sold or bartered. Any such mileage or tickets are void if transferred for cash or other consideration." PX 3.

Petitioner Frequent Flyer Depot, Inc. describes itself as "the premiere online brokerage of frequent flyer tickets and mileage rewards." 1 RR 71, PX 1. Petitioner George Pirkle owns 65% of FFD and directs its purchase and sale of AAdvantage miles and award tickets. 1 RR 30, 38-39. His son, petitioner Robert Pirkle, is president of FFD, owns 35%, and arranges transactions for customers to buy AAdvantage award tickets. 1 RR 31, 84-85.

Petitioners admit that they have known about the No Sale Rule for years. 1 RR 41 ("Q. You understand that Frequent Flyer Depot's actions that you direct violate the AAdvantage terms and conditions? A. Yes."); 1 RR 84; 2 CR 343, 351-352. Nevertheless, petitioners facilitate and induce repeated breaches of the No Sale Rule by buying mileage credit from program members and selling award tickets to American's potential customers, all without

compensation to the airline. 1 RR 35-38, 44, 46-47; 2 CR 300.

Petitioners induce these breaches by acting as brokers between AAdvantage members who have frequent-flyer miles and people who want to obtain tickets. For example, if A has a large balance of AAdvantage miles and B wants to fly first class to Japan, petitioners would instruct A to obtain a first-class ticket in B's name and would then pay A a substantial cash amount for the AAdvantage miles used to obtain the ticket. B would pay petitioners for the ticket an amount much less than B could purchase the ticket from American. Petitioners make their money on the difference between what they pay A and charge B. 1 RR 34-35, 42-44. Petitioners' business is lucrative. They net up to $1200 profit per sale, with international first/business class travel (American's most sought after customers) comprising 99.9% of the award tickets they sell. 1 RR 35, 38.

In order to obtain tickets for its clients, FFD routinely defrauds American's reservation agents by obtaining award-related services, without divulging that the tickets will be or have been sold. 1 RR 49, 85; 2 CR 308-309, 337. FFD employees "pick up the phone and call American about a particular route." 2 CR 337. They represent that they are calling about AAdvantage awards on particular routes, but do not reveal that the award tickets will be sold. 1 RR 85; 2 CR 337. FFD customer-service representatives call American about AAdvantage tickets that FFD already has sold, but again do not disclose that fact. 1 RR 49; 2 CR 308-309. Petitioners freely admit that they convince their customers to lie to American and say that the award tickets they bought were "gifts" in order to conceal their conduct from American. 1 RR

51 ("Q. You instruct your customers to tell American that the AAdvantage award ticket they purchased was a gift? A. Yes. Q. And that's a lie because actually it wasn't a gift, it was purchased? A. That's correct."); 1 RR 87.

Petitioners, however, are not alone in this scheme to illegitimately and improperly acquire American's tickets. Thus, American filed this lawsuit against petitioner and other companies and individuals, involved in similar illicit activities, to stop the wrongful purchase, sale, and barter of AAdvantage miles and award tickets. 1 CR 41-72. American asserted claims for interference, fraud, and misappropriation as to all petitioners and breach of contract as to Robert Pirkle, who is an AAdvantage member. 1 CR 50-53, 62-68. American asserted similar claims against Main St. Travel Center of Monsey, Inc. and two of its agents and Luxury Tour Source, Ltd. and its president. 1 CR 41-72.[2]

Petitioners responded by moving to dismiss all of the claims against them, except for the breach-of-contract claims, on the grounds that the claims were preempted by 49 U.S.C. §41713. 1 CR 79-86. A few weeks later Main St. filed a similar motion. 1 CR 180-194.

Petitioners then filed a counterclaim against American. 1 CR 155-173. Petitioners asserted that American tortiously interfered with their business relationships and violated the Texas antitrust statute

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[2] American brought a separate breach-of-contract claim against Main St. because Main St. had agreed in a contract with American not to issue frequent-flyer award tickets that had been purchased, bartered, or sold in violation of the No Sale Rule. Pet. App. 48a.

and Texas Deceptive Trade Practices Act. Petitioners based their claims on American's acts to enforce its rights under its contracts with its customers to prevent them from selling their frequent flyer miles to petitioners. 1 CR 164-169. American filed an answer to the counterclaim and asserted, *inter alia*, that petitioners' claims were preempted by 49 U.S.C. §41713(b)(1). 1 CR 176-178.

On September 16, 2008, the district court heard American's request to enter a temporary injunction prohibiting petitioners from buying, selling, bartering, or soliciting AAdvantage rewards during pendency of the suit. 2 CR 280-370. Petitioners did not dispute their fraudulent acts but argued that various affirmative defenses prevented issuance of the temporary injunction. 2 CR 371-384. The district court rejected petitioners' arguments and granted American's application. 2 CR 422-424. American did not seek a temporary injunction against Main St.

Petitioners filed an accelerated interlocutory appeal from the temporary-injunction order. 2 CR 425; see Tex. Civ. Prac. & Rem. Code §51.014(a)(4) (authorizing interlocutory appeals from an order granting a temporary injunction); Tex. Rule App. Proc. 28.1(a) (providing that appeals from interlocutory orders will be accelerated). Main St. filed no appeal and had no right to, as it had not been targeted for a temporary injunction.[3]

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[3] Main St. is not a proper respondent in this proceeding, and was not entitled to respond to the petition, because it is not a party to the judgment entered by the court of appeals. Sup. Ct. Rule 12.6 ("All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court . . . ."). Main St. was not subject to the temporary injunction entered by the district court that

The court of appeals affirmed the district court's order granting the temporary injunction. *Frequent Flyer Depot, Inc.* v. *American Airlines, Inc.*, 281 S.W.3d 215 (Tex. App.—Fort Worth 2009, pet. denied). The court of appeals held that American's claims are not preempted by 49 U.S.C. §41713(b)(1) because the statute preempts only those state actions having a regulatory effect on airlines. Pet. App. 6a-9a. Section 41713(b)(1) provides that states "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." The court of appeals explained that American's claims were not preempted because "although American has brought mostly tort claims, those claims attempt to protect the vitality of its self-imposed obligations: those arising from the AAdvantage® program." Pet. App. 8a. The court further explained that

> "American's invoking the benefits and protections of state law to protect its own agreements does not have the same impermissible regulatory effect upon prices, routes, or services that Congress was concerned with in enacting section 41713(b)(1). The Act was intended to pre-empt only those state actions having a regulatory effect upon the airlines rather than to preclude airlines from seeking the benefits and protections of state law to enforce their self-imposed standards, regulations, and contracts." *Ibid.*

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was reviewed via interlocutory appeal. Main St. was neither an appellant nor an appellee in the court of appeals and filed no brief in the court of appeals. Therefore, Main St.'s filing of a brief in support of the petition is improper.

The court concluded that "denying American access to state courts for such purpose would seem to have such an impermissible regulatory effect." *Id.*, at 8a-9a. The court of appeals also rejected petitioners' other challenges to the temporary injunction on substantive and procedural grounds under Texas law and held that the district court did not abuse its discretion in entering the temporary injunction. *Id.*, at 9a-25a.

Petitioners then sought discretionary review from the Texas Supreme Court. On August 21, 2009, the Texas Supreme Court denied petitioners' petition for review. The court denied petitioners' motion for rehearing on October 9, 2009.

While petitioners have pursued interlocutory review of the temporary injunction, the case has proceeded forward in the district court. Tex. Civ. Prac. & Rem. Code §51.014(b) (providing that an interlocutory appeal of a temporary injunction does not stay further proceedings or trial pending appeal). Among the various proceedings that have occurred, American has amended its petition to assert additional tort claims against petitioners and the other defendants that were not at issue in the temporary-injunction proceeding. For example, American's Seventh Amended Petition asserts a tort claim against petitioners for knowingly accessing American's computer systems without consent in violation of Texas Penal Code §33.02 and Texas Civil Practice & Remedies Code §143.001. *American Airlines, Inc.* v. *Frequent Flyer Depot, Inc., et al.*, Case No. 067-224132-07, Seventh Amended Petition filed on Dec. 31, 2009, at 32-33.

After petitioners filed their petition with this Court, both they and Main St. filed motions to sever

the ongoing case in the trial court. The district court denied these motions on January 11, 2010. If the district court had granted the motions to sever, the case from which this proceeding arises would have been split into two separate and independent cases. Tex. Rule Civ. Proc. 41; *Kan. Univ. Endowment Assn.* v. *King*, 162 Tex. 599, 611-612, 350 S.W.2d 11, 19 (1961). On February 18, 2010, the district court entered an order setting this case for trial on August 16, 2010. *American Airlines, Inc.* v. *Frequent Flyer Depot, Inc., et al.*, Case No. 067-224132-07, Order Resetting Case for Final Trial.

REASONS FOR DENYING THE PETITION

I. THE COURT DOES NOT HAVE JURISDICTION TO REVIEW THIS INTERLOCUTORY STATE-COURT JUDGMENT.

The Court does not have jurisdiction to review the state court of appeals's nonfinal interlocutory judgment against petitioners. 28 U.S.C. §1257(a). The Court has jurisdiction to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." *Ibid.*; see *Johnson* v. *California*, 541 U.S. 428, 430 (2004) (*per curiam*); *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 77 (1997). The Court has characterized §1257(a) as "a firm final judgment rule" that limits the Court's jurisdiction to review the judgments of state courts. *Jefferson*, 522 U.S., at 81. "[T]he finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Ibid.* (quoting *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945)).

Thus, "[t]o be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Ibid.* (quoting *Market Street Ry. Co.* v. *R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945)). It is indisputable that the court of appeals's judgment is not an effective termination of the litigation. None of the claims brought by American or counterclaims brought by petitioners has been adjudicated on the merits either by summary judgment or at trial. And the underlying case in the state court has proceeded while the appeal of the temporary injunction has been ongoing. Because the court of appeals's decision has not "effectively determined the entire litigation," it is not final under §1257. *Id.*, at 84.

Nor does this case fall within any of the "exceptional categories of cases" that might be regarded as final under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). The federal preemption issues presented in the underlying case have never been finally resolved on the merits. The state court determination of entitlement to a temporary injunction pending a resolution of the ultimate merits of the case does not itself constitute any kind of final merits resolution that could remotely bring the case within any imaginable definition of "final." Indeed, if petitioners were to prevail at trial and defeat American's claims on state-law grounds, then petitioners' preemption defense would never need to be decided by the state courts. See *Jefferson*, 522 U.S., at 82 (holding that interlocutory state-court judgment was not final because "[r]esolution of the

state-law claims could effectively moot the federal-law question raised here"). And if the state courts do eventually resolve petitioners' preemption defense on the merits, they can seek appellate review at that time. See *Johnson*, 541 U.S., at 430-431; *Jefferson*, 522 U.S., at 82-83. Additionally, reviewing the court of appeals's decisions now would not resolve the entire case because the temporary injunction was based on only some of the tort claims asserted against petitioners, and did not address American's other claims against petitioners and their codefendants or petitioners' counterclaims against American. See *Flynt* v. *Ohio*, 451 U.S. 619, 621 (1981) (*per curiam*) ("[I]n most, if not all, of the cases falling within the four exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were no other federal issues to be resolved. There was thus no probability of piecemeal review with respect to federal issues.").

The Court need read no further. Petitioners acknowledge that they seek review of a nonfinal, temporary injunction from state court. Proceedings in the case are continuing, and the matter will likely be tried to a conclusion on the merits before the Court returns to the bench for its October 2010 term. The Court's jurisdictional statute sensibly prohibits premature review of petitioners' preemption defense before the state courts have been permitted even to make a considered, final determination on the matter. See *Costarelli* v. *Massachusetts*, 421 U.S. 193, 196 (1975) (*per curiam*) ("an important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when

the underlying dispute may be otherwise resolved"). The petition should be denied.

II. THE COURT OF APPEALS'S INTERLOCUTORY DECISION IS CORRECT AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT.

Even if the Court had jurisdiction, review is not warranted because the court of appeals's interlocutory judgment is correct and there is no conflict among the lower courts. The court of appeals correctly determined—consistent with every other court to address this issue—that §41713(b)(1) does not preempt American's claims against petitioners because American seeks only to enforce its own legitimate contracts, and the claims do not have any regulatory effect on airlines. Pet. App. 8a-9a; see also *Alaska Airlines, Inc.* v. *Carey*, 2009 WL 777391, *1-*2 (WD Wash. Mar. 19, 2009) (holding that §41713(b)(1) did not preempt airline's tort claims against person who brokered frequent-flyer tickets in violation of airline's requirements that award tickets could not be sold or purchased); *Cont'l Airlines, Inc.* v. *Weiner*, 1999 U.S. Dist. LEXIS 16377, *15-*18 (CD Cal. 1999) (same).

A. The Court of Appeals Correctly Determined That American's Tort Claims Against Petitioners Are Not Preempted.

When Congress enacted the Airline Deregulation Act to deregulate the airline industry, it determined that "maximum reliance on competitive market forces" would further "efficiency, innovation, and lower prices." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). Thus, the Court has explained that it is "the ADA's purpose to leave largely *to the airlines themselves*, and not at all to

States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228 (1995) (emphasis added). To "ensure that the States would not undo federal deregulation with regulation of their own," *Morales*, 504 U.S., at 378, Congress provided that states "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. §41713(b)(1).

In *Wolens*, the Court held that claims under a state-law consumer protection statute were preempted because it "serve[d] as a means to guide and police the marketing practices of the airlines." 513 U.S., at 228. Thus, *Wolens* clarifies that claims are preempted only if they would result in regulating how airlines, like American, do business. 513 U.S., at 228-229. This is consistent with the Court's statement in *Morales* that "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." 504 U.S., at 390.

Wolens explained that "the phrase 'having the force and effect of law' is most naturally read to 'refe[r] to binding standards of conduct that operate irrespective of any private agreement.'" 513 U.S., at 229, n.5 (quoting Brief for United States as Amicus Curiae 16). *Wolens* further explained that "the ban on enacting or enforcing any law 'relating to rates, routes, or services' is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on

the operations of an air carrier.'" *Ibid.* (quoting Brief for United States as Amicus Curiae 16).

Consistent with the text of §41713(b)(1), *Morales*, and *Wolens*, the court of appeals determined that American's tort claims that were the basis for the temporary injunction were not preempted. Pet. App. 9a. The court explained that the ADA "was intended to pre-empt only those state actions having a regulatory effect upon the airlines rather than to preclude airlines from seeking the benefits and protections of state law to enforce their self-imposed standards" and concluded that "denying American access to state courts for such purposes would seem to have such an impermissible regulatory effect." Pet. App. 8a-9a. The court further explained that American's claims against petitioners "attempt to protect the vitality of [American's] self-imposed obligations." Pet. App. 8a.[4] In other words, American's attempts to enforce its legitimate contracts do not "hav[e] the force and effect of law" because they do not impose regulatory "standards of conduct." *Wolens*, 513 U.S., at 229, n.5.

Petitioners' complaint that "[t]he Texas courts eliminated Frequent Flyer's competition with American," Pet. 11, merely underscores why American's claims are not preempted. Petitioners admit that their business is helping people obtain tickets from American under false pretenses. They

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[4] In the lower courts, petitioners challenged the validity and enforceability of the contract between American and the AAdvantage members that govern American's frequent-flyer program. Although the court of appeals held that the contracts between American and its customers are valid under Texas law, Pet. App. 12a-16a, petitioners impermissibly continue to dispute the court of appeals's state-law decision. See Pet. 7-8.

do not compete with American—they help others take seats on American's flights without paying American for them. Petitioners' so-called competition is nothing more than an attempt to argue that American cannot restrict who it sells tickets to even though it is long settled that airlines and common carriers have the right to control the distribution of tickets for their flights. See *Bitterman* v. *Louisville & Nashville R.R.*, 207 U.S. 205, 221 (1907); *Cont'l Airlines, Inc.* v. *Intra Brokers, Inc.*, 24 F.3d 1099, 1103-1104 (CA9 1994); *American Airlines, Inc.* v. *Christensen*, 967 F.2d 410, 418 (CA10 1992).

Under petitioners' view of the law, they could print counterfeit tickets and use them to fly for free on American's planes, because American would be powerless to enforce its own ticketing policies and contracts in court. While the preemptive effect of §41713(b) is quite broad, nothing in the text or history of §41713(b) or this Court's prior decisions prevents airlines, like American, from using the courts to enforce legitimate contractual restrictions on who flies on its planes, subject to relevant federal statutes and regulations. Taken seriously, Petitioners' argument would lead to the conclusion that American and other airlines cannot control who they transport on their planes and cannot defend themselves against common fraudsters.

B. The Court of Appeals's Decision Does Not Conflict with the Decision of Any Other Court.

Every court to review airlines' claims seeking to stop frequent-flyer fraud has held that that the claims are not preempted. Pet. App. 8a-9a; see also *Carey*, 2009 WL 777391, *1-*2; *Weiner*, 1999 U.S.

Dist. LEXIS 16377, *15-*18.[5] Petitioners' suggestion that the court of appeals's decision is somehow inconsistent with the decisions of other courts erroneously presupposes that the court of appeals wrongly held that whether tort claims are preempted depends on the identity of the person asserting the claim rather than the substance of the claim. See Pet. 9-10, 12-15; Main St. Br. 11. But the court of appeals never suggested that whether §41713(b)(1) preempts a state-law claim is based on the identity of the person asserting the claim. Pet. App. 7a-9a. Rather, the court of appeals held, consistent with *Wolens*, that §41713(b)(1) preempts claims that attempt to impose state regulatory standards on airlines but that §41713(b)(1) does not preempt claims brought to enforce an airline's own self-imposed rules, rights, and obligations. Pet. App. 8a-9a.

In the cases cited by petitioners, the courts held that §41713(b)(1) preempted claims because they would have had a regulatory effect on the prices, routes, or services of an airline, not because of the identity of the defendant. See *Huntleigh Corp.* v. *La. State Board of Private Sec. Examiners*, 906 F.Supp. 357, 362 (ED La. 1995) (holding that §41713(b)

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[5] Contrary to what Main St. suggests, these cases are not in tension with the Seventh Circuit's decision in *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 889 F.2d 751 (1989), which was decided before *Morales* and *Wolens*. In any event, *Illinois Corporate Travel* held that claims against an airline challenging its marketing and advertising practices under the Illinois Consumer Fraud and Deceptive Trade Practices Act were preempted under the ADA. 889 F.2d, at 754-755. This is precisely the same result reached in *Wolens*, which also involved claims against an airline under the same Illinois statute. See 513 U.S., at 227-228.

preempted state law attempting to regulate licensing of an agent for an airline that provided security screening services); *Marlow* v. *AMR Servs. Corp.*, 870 F.Supp. 295, 299 (D. Haw. 1994) (holding that §41713(b) preempted claims against company that provided jetbridge services to an airline); *Lyn-Lea Travel Corp.* v. *American Airlines, Inc.*, 283 F.3d 282, 287 (CA5) (holding that tortious-interference claims brought by ticket agent against a company that provided reservation services for an airline based on airline's decision to lower ticket prices were preempted), cert. denied, 537 U.S. 1044 (2002); *Fed. Express Corp.* v. *Cal. Pub. Utils. Comm'n*, 936 F.2d 1075, 1078-1079 (CA9 1991) (holding that §41713(b) preempted claims against a cargo air carrier's trucking operations); *Cont'l Airlines, Inc.* v. *American Airlines, Inc.*, 824 F.Supp. 689, 697 (SD Tex. 1993) (holding that preemption under §41713(b) could not be avoided by suing an airline's parent corporation).[6] In other words, the state-law claims in these cases were preempted because of the regulatory effect the claims would have had on the airlines, even though the claims were brought against agents of or companies affiliated with the airlines. But no case has held that a stranger to an air carrier is somehow entitled to the protections of §41713(b)(1) when the asserted claims will not have an improper regulatory

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[6] Similarly, *ABC Charters, Inc.* v. *Bronson*, 591 F.Supp.2d 1272 (SD Fla. 2008), held that §41713(b) preempted Florida state laws that attempted to regulate federally licensed companies that provided charter flights to Cuba and agents that arranged for the charter flights to Cuba. *Id.*, at 1299-1300. The court held that the state law was preempted because the state law would have affected the ability of the charter flight providers to provide air service to Cuba. *Ibid.*

effect on an air carrier that provides air transportation.

Similarly, petitioners' misplaced suggestion that the court of appeals's decision is somehow inconsistent with the decisions of other courts that have held tort claims are preempted, see Pet. 14-15; Main St. Br. 10-11, ignores the fact that no court has ever held that all tort claims are categorically preempted. The various cases cited by petitioners to suggest the existence of a conflict are readily distinguishable as they all directly challenged how airlines or their affiliates provided services. See *United Airlines, Inc.* v. *Mesa Airlines, Inc.*, 219 F.3d 605, 608-609 (CA7) (holding that state-law claims brought by a regional airline against a national airline for its decision to change what regional airline it would codeshare with were preempted), cert. denied, 531 U.S. 1036 (2000); *Lyn-Lea Travel Corp.*, 283 F.3d, at 287 (holding that tortious-interference claims brought by ticket agent against a company that provided reservation services for an airline based on airline's decision to lower ticket prices were preempted); *Cont'l Airlines, Inc.* v. *United Airlines, Inc.*, 120 F.Supp.2d 556, 572-574 (ED Va. 2000) (holding that claims challenging policies regarding carry-on luggage were preempted); *Buck* v. *American Airlines, Inc.*, 476 F.3d 29, 36 (CA1 2007) (holding that state-law claims seeking refunds of fees paid to airline were preempted); *Travel All Over the World, Inc.* v. *Kingdom of Saudi Arabia*, 73 F.3d 1423, 1434-1435 (CA7 1996) (holding that state-law intentional tort claims based on airline's refusal to transport passengers were preempted); *Ex parte Delta Air Lines, Inc.*, 785 So.2d 327, 334 (Ala. 2000) (holding that tort claims for damaging luggage were preempted); *Casas* v. *American Airlines, Inc.*, 304

F.3d 517, 525-526 (CA5 2002) (holding that state law claims for lost luggage were preempted); *Statland* v. *American Airlines, Inc.*, 998 F.2d 539, 541-542 (CA7 1993) (holding that claims seeking refund of fees paid to airline were preempted). These cases are inapposite because American merely seeks to enforce its own contractual and related rights, and none involves a context remotely similar to this case.

Petitioners attempt to paint a conflict by improperly lumping together the entire body of case law dealing with §41713(b) and broadly asserting differences among opinions. But petitioners make no effort whatsoever to acknowledge the specific context within which this case arises. It is one thing to say that statutory or tort claims against an airline are preempted because they create an impermissible state regulatory effect on the airline's rates, routes, and services. But it is another thing altogether to assert that §41713(b)(1) prevents an airline from using a state's judicial processes to enforce its contractual rights. Permitting enforcement of contract rights has no impermissible regulatory effect on the airline or market competition and, understandably, petitioners cannot point to a single decision conflicting with the court of appeals's opinion in this case.

Petitioners decline to recognize this contextual distinction because it shows the absence of any split of authority touching the issues actually presented by this case. That they are forced into making the broadest of generalizations only reinforces the ineluctable conclusion that the petition has nothing to add to the already burgeoning body of §41713(b) precedent.

So, while some have pointed to an alleged conflict with respect to the meaning of "services" under §41713(b), see *Nw. Airlines, Inc.* v. *Duncan*, 531 U.S. 1058 (2000) (O'Connor, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari),[7] that question is entirely irrelevant in this case. As the Second Circuit has acknowledged, the purported difference between the definitions of services primarily relates to whether §41713(b)(1) preempts claims related to luggage handling, boarding procedures, and providing food and drink on flights. *Air Transport Assn. of America, Inc.* v. *Cuomo*, 520 F.3d 218, 223 (CA2 2008). This case, which addresses petitioners' activities involving the misappropriation of American's tickets simply does not implicate the issue on which the circuits are purportedly divided.

C. Petitioners' Alternative Arguments Do Not Merit This Court's Attention.

Petitioners also raise, as an alternative question, that "[i]f preemption is limited by the identity of the alleged wrongdoer, what criteria are to be used in making the determination of whether a state law claim against a particular person is preempted." Pet. i.[8] Petitioners' alternative question, however,

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[7] The Court has subsequently denied other petitions that purport to present the same split. See, *e.g.*, *Lyn-Lea Travel Corp.* v. *American Airlines, Inc.*, 537 U.S. 1044 (2002) (order denying petition); *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248 (CA11 2003) (holding that state-law whistleblower claims were not preempted by ADA), cert. denied, 540 U.S. 1182 (2004).

[8] Petitioners also suggest in passing that 49 U.S.C. §41712, which gives the Department of Transportation the discretion to investigate alleged acts of deceptive practices or unfair methods of competition, may also apply in this case. Pet. 17. Similarly,

underscores its fundamental misunderstanding of the court of appeals's decision. As previously explained, the court of appeals never held that preemption is limited based on the identity of a litigant. Rather, it addressed whether American's claims "hav[e] the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. §41713(b)(1).

In any event, petitioners' suggestion that if the identity of the litigant is relevant, then the Court should determine whether they are "air carrier[s]" or "ticket agent[s]" is entirely misplaced. Pet. 5. The plain text of §41713(b)(1) states that state law is preempted only to the extent it is "related to a price, route, or service of an air carrier *that may provide air transportation under this subpart*." 49 U.S.C. §41713(b)(1) (emphasis added). Thus, whether petitioners are air carriers or ticket agents (in fact, they are neither) is irrelevant. The relevant inquiry is whether the claims are related to the services of an

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Main St. argues that in addition to the express preemption argument raised by petitioners, that American's claims are also preempted by the "comprehensive administrative remedies promulgated by Congress" in §41712. Main St. Br. 17. Any argument that §41712 applies in this case is not properly before the Court. The question presented is limited to the preemptive effect of §41713. Pet. i. Additionally, petitioners never raised this argument in the district court. It was raised for the first time in the court of appeals, but the court of appeals declined to address the issue. In any event, §41712 does not apply in this case in any way that affects American's claims. Main St. also argues in passing that American's claims are conflict preempted. Main St. Br. 17-18. This argument has not been raised below, but in any event, Main St. is simply incorrect.

air carrier "that may provide air transportation." *Ibid.*

Finally, petitioners' suggestion that the court of appeals's application of §41713(b) in this case is somehow contrary to principles of equal protection, Pet. 18-19, is wholly misplaced. First, this issue is not properly before the Court because petitioners never raised any equal-protection argument in the courts below. In any event, it is well settled that the equal-protection clause prohibits Congress from treating different persons differently with respect to economic regulation only if it had no rational basis to do so. The Court has recognized that Congress's intent in enacting the ADA was to protect airlines from state regulation. Thus, it is unsurprising that the protections of §41713(b) would not apply to American's claims against petitioners.[9]

III. This Interlocutory Appeal Is a Poor Vehicle for Addressing the Questions Presented.

Finally, this case is a particularly poor vehicle for addressing the preemptive effect of §41713(b). Because this case involves the interlocutory appeal of a state-court order granting a temporary injunction, this case will likely be tried on the merits in state district court before this Court could even hear this

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[9] Petitioners' suggestion that American lacks standing to claim alleged wrongs committed against its customers, Pet. 17, n.7, is wholly irrelevant. All of American's claims against petitioners are based on injuries suffered by American due to petitioners' violation of American's legal rights and interests. See Pet. App. 42a-49a. Moreover, because American's claims are grounded in Texas law and are asserted in Texas state court, Texas law determines whether American can complain of the conduct at issue.

case. Indeed, the district court has set the case for trial on the merits in August, before the Court even returns for the start of its October 2010 Term. And when the case is tried, it is possible that the preemption issues raised in this case will be rendered moot depending on the resolution of the state-law issues and whatever disputed factual issues, if any, remain in the case.

With no stay in place and the district-court litigation moving forward toward a resolution on the merits in the near future, there is no rationale to justify the Court's commitment of resources to a petition on an interlocutory order that will almost certainly be mooted in the coming months by a final decision on the merits from which petitioners, if they so choose, may seek and obtain appellate review of the entire case, not merely the sliver that was made the subject of the temporary injunction and the interlocutory appeal. In an appeal after final judgment, the appellate courts will have an opportunity to review the scope of preemption under §41713(b) as it applies to all of the claims in this case, not just the few claims that were at issue with respect to the temporary injunction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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